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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-602

HARSH BUILDING CO., *et al.*, *Petitioners*,

v.

SAM BIALAC, *et al.*, *Respondents*.

On Petition for a Writ of Certiorari
To the United States
Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on December 11, 1972, and (2) granting the petition. As grounds for this motion, petitioner states the following:

I. RESPONDENTS HAVE MISLED THE COURT IN SUGGESTING THAT THEY FIRST BECAME AWARE AT TRIAL OF THE "FACTS" UNDERLYING THEIR JURISDICTIONAL OBJECTIONS.

In their Memorandum in Opposition, the Bialacs state:

> "While the plaintiffs did stipulate prior to trial that the principal place of business [of HBC] was in Oregon, *facts to the contrary were developed at trial.* Accordingly, before the plaintiffs had rested they objected to the jurisdiction on the grounds that there was no diversity." (At pp. 2-3) (Emphasis supplied).

By this characterization of events below, the Bialacs have implied that they first became aware of the facts underlying their jurisdictional objections during trial. The inference is pernicious, unsupported in the record and grossly misleading.

The Bialacs knew during negotiations for sale of the apartment project that HBC was to be a "shell" corporation whose only initial asset, in addition to its capitalization, would be the project. (T. 1253, testimony of William Chertok, attorney for the Bialac interests). Indeed, Jerry Bialac so informed Harold J. Schnitzer, later president of HBC, during their initial discussions. (T. 79-80). The Bialacs were also aware at an early date that the FHA regulatory agreement signed by HBC in 1965 (Ex. 14) precluded any other business activity. (See Brief of Appellants, filed in the court of appeals, at 21). Significantly, the Bialacs have not pointed to any item of evidence introduced at trial which, for the first time, suddenly and serendipitously revealed to them facts which gave rise to their jurisdictional objections.

It is in light of this true state of affairs that the court of appeals' action below conflicts dramatically and directly with other lower court decisions which have refused to allow litigants to long conceal jurisdictional objections, springing the trap at the last moment. See, *e.g.*, *DiFrischia v. New York Cent. R.R.*, 279 F.2d 141, 144 (3d Cir. 1960). The court of appeals was under the same misapprehension that was fostered by the Bialacs in their Memorandum in Opposition filed in this Court – that their stipulation as to HBC's principal place of business was followed by the discovery of later evidence to the contrary.

This substantial mischaracterization of the record should not be countenanced. The denial of certiorari should be reconsidered and the jurisdictional issue resolved on the merits.

II. THE RECORD BELOW IS NOT, AS RESPONDENTS ASSERT, DEVOID OF EVIDENCE WHICH SUPPORTS PETITIONERS' REQUEST FOR AN EVIDENTIARY HEARING TO DETERMINE HBC's PRINCIPAL PLACE OF BUSINESS.

In their Memorandum in Opposition, the Bialacs seek to justify the court of appeals' summary remand by arguing that

> " . . . petitioners do not at the present time name one single fact which they would offer to show error by the Court of Appeals [in failing to provide for an evidentiary hearing on HBC's principal place of business]." (At 3).

Putting aside for a moment the obvious rejoinder – that the record below, because of the directed verdicts, consists

only of the Bialacs' evidence – petitioners would dispel the unwarranted suggestion that their position is wholly without support in the record.

During the cross-examination of Jerry Bialac, the following colloquy occurred regarding his trips outside the state of Arizona on behalf of HBC:

> "Q. Now, in January of 1966, did you go to Jacksonville, Florida?
>
> "A. Yes, sir . . .
>
> "Q. Did Harsh Building Company have any business in Jacksonville, Florida?
>
> "A. Mr. Schnitzer asked me to look at a project in Jacksonville that we might be jointly interested in.
>
> "Q. What project was that?
>
> "A. That was an FHA high-rise apartments (sic) that we were thinking of going in together and making the same type of 234 condominium . . . . " (T. 635).

The quoted testimony suggests that HBC's corporate plans and objectives were not necessarily limited to the state of Arizona. Petitioners cannot prove more by reference to the trial record, because there was no opportunity for them to contribute evidence of their own to that record.

Yet, the Bialacs' own testimony shows that an evidentiary inquiry into the "total activity" of HBC at the date of removal of this cause would not be fruitless. The entitlement to such a hearing under even minimal concepts of "due process of law" is clear (petition at 8-12). The district court should hear evidence as to whether the location of HBC's only revenue-producing asset in Arizona was

a mere "temporary circumstance," when considered in light of its corporate purposes and other activities. Cf. *Television Reception Corp. v. Dunbar*, 426 F.2d 174, 177 (6th Cir. 1970). Reconsideration by this Court of its denial of certiorari, a grant of certiorari, and a limited remand for an evidentiary hearing would give petitioners the day in court which they have never had upon the factual question of HBC's principal place of business.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition for writ of certiorari, petitioners pray that the Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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